TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 49

THE WESTERN UNION TELEGRAPH COMPANY, PETITIONER,

vs.

KATHARINE F. LENROOT, CHIEF OF THE CHILDREN'S BUREAU, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 5, 1944.

CERTIORARI GRANTED MAY 8, 1944.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 21, 1944.

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

KATHARINE F. LENROOT, Chief of the Children's Bureau, United States Department of Labor, Plaintiff-Appellee,

against

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, Defendant-Appellant

STATEMENT UNDER RULE 13

The above entitled action was commenced in the District Court for the Southern District of New York by the filing of a complaint on August 11, 1942.

Personal service of the summons and complaint was made on the defendant-appellant on August 13, 1942.

The defendant-appellant's answer was both served and filed on September 2, 1942.

All of the facts were agreed upon by the attorneys for the respective parties hereto, under a stipulation dated June 18, 1943, and thereafter filed with the Clerk of the District Court for the Southern District of New York.

On July 23, 1943, the plaintiff-appellee made a motion for summary judgment returnable August 3, 1943.

On July 29, 1943, the defendant-appellant made a cross-motion for a summary judgment returnable August 3, 1943.

Both motions for summary judgment were heard August 3, 1943, by Honorable Simon H. Rifkind, United States District Judge.

[fol. 2] On October 7, 1943, Honorable Simon H. Rifkind, United States District Judge, filed an opinion granting the plaintiff-appellee's motion for summary judgment and denying the defendant-appellant's cross-motion for summary judgment.

Judgment in favor of the plaintiff-appellee and against the defendant-appellant was filed on November 16, 1943.

The defendant-appellant filed a notice of appeal on November 19, 1943.

No question was referred to a commission or commissioner, master or referee.

No change of parties has taken place.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 19-78

[Same Title]

COMPLAINT—Filed August 11, 1942

I

Plaintiff brings this action to enjoin defendant from violating the provisions of Section 15(a) (4) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201, hereinafter called the Act.

[fol. 3] II

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

III

Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of New York, having its principal office at 60 Hudson Street, in the City of New York, New York County, New York, within the jurisdiction of this Court, and having places of business and producing establishments situated in Baltimore, Maryland, Austin, Texas, San Antonio, Texas, Jacksonville, Texas, Flagstaff, Arizona, Woonsocket, Rhode Island, Portland, Maine, and numerous other cities throughout the United States, and is, and at all times hereinafter mentioned was, engaged at its said establishments in the production, sale, and transmission of telegraph messages.

IV

Within the period beginning on or about January 1, 1941 and continuing to the date hereof, defendant employed, suffered, and permitted to work in or about its said establishments many minors under sixteen (16) years of age.

V

Within the period beginning on or about January 1, 1942 and continuing to the date hereof, defendant employed,

suffered, and permitted to work in or about its said establishments many minors between sixteen (16) and eighteen (18) years of age in the occupation of motor vehicle driver, such employment being oppressive child labor, as defined in Section 3(1) of the Act and Child Labor Order No. 2 [fol. 4] thereunder. The said order was duly issued on November 27, 1939, by the Chief of the Children's Bureau, United States Department of Labor, and became effective in accordance with its terms, January 1, 1940. The said order was published in the Federal Register and is known as Title 29, Chapter 4, Code of Federal Regulations, Part 422, Section 422.2. A copy of the said order is attached hereto, made a part hereof, and marked "Exhibit A."

VI

Within the period beginning on or about January 1, 1941 and continuing to the date hereof, defendant has been engaged in shipping telegraph messages in interstate commerce and in delivering telegraph messages for shipment in interstate commerce, the said goods having been produced in its said establishments in or about which the aforesaid minors were employed, suffered, and permitted to work within thirty (30) days prior to the removal of said goods therefrom.

VII

The shipment and delivery for shipment in interstate commerce by defendant of telegraph messages produced in its said establishments in or about which the aforesaid minors were employed, suffered, and permitted to work within thirty (30) days prior to the removal of such goods therefrom constitute violations of Section 15(a)(4) of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment enjoining and restraining defendant, its officers, agents, servants, employees, attorneys, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Section 15(a) (4) of the Act, both [fol. 5] permanently and during the pendency of this action,

and such other and further relief as may be necessary and appropriate.

Warner W. Gardner, Solicitor; Roy C. Frank, Assistant Solicitor; Julius Schlezinger, Principal Attorney; Arthur E. Reyman, Regional Attorney; United States Department of Labor, Attorneys for Plaintiff.

Post Office Address: Arthur E. Reyman, Regional Attorney, U. S. Department of Labor, Parcel Post Building, 341 Ninth Avenue, New York, New York or Solicitor's Office, U. S. Department of Labor, Washington, D. C.

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[fol. 6] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 19-78

[Same Title]

ANSWER

The defendant in the above-entitled action, by Francis R. Stark and Clarence W. Roberts, its attorneys, answering the plaintiff's complaint herein,

1. Admits the allegations contained in the paragraphs thereof numbered I and II.

2. Admits the allegations contained in the paragraph thereof numbered III, except that defendant denies that the places of business therein referred to are producing establishments, and denies that defendant is or ever has been engaged in the production or sale of telegraphic messages at the establishments therein referred to or anywhere else.

3. Admits the allegations contained in the paragraph thereof numbered IV, except that defendant denies that the establishments therein referred to were producing establishments.

4. Admits the allegations contained in the paragraph thereof numbered V, except that defendant denies that the establishments therein referred to were producing establishments.

5. Denies the allegations contained in the paragraphs thereof numbered VI and VII, and denies each and every allegation in the complaint contained except as hereinbefore specifically admitted or denied.

[fol. 7] Further answering, defendant says that as it is advised by counsel and believes the lawfulness of employing messengers of any particular age in connection with its public telegraph business and the lawfulness of employing messengers of any particular age to operate motor vehicles in connection with its public telegraph business are matters exclusively regulated by the laws of the several States, and that there is no applicable Federal law of any kind whatever; that when the act which is now known as the Fair Labor Standards Act was under consideration by Congress an attempt was made to include a prohibition of oppressive child labor, as therein defined, in any occupation, but that Congress deliberately and purposely left the subject of child labor in the telegraph industry to regulation by the several States; that in every instance in which persons under sixteen have been employed by defendant, and in every instance in which persons under eighteen have been employed by defendant in the operation of motor vehicles, such employment has been lawful and has continued to be lawful under the local law; that no such persons have been employed by defendant except in the capacity of telegraph messengers; that it was the policy of defendant for many years not to employ messengers under sixteen for any purpose, and not to employ messengers under eighteen in the operation of motor vehicles, and such continued to be defendant's policy until the sharp increase in the volume of telegraph business because of the war and the difficulty of securing and maintaining an adequate force of older messengers because of their rapid absorption in war industries combined to produce a shortage of messengers which constituted a serious hazard to the defendant's part in the war effort; that for these reasons defendant has been compelled, since the dates named in the complaint, to employ a relative small number of younger messengers where the local law permitted; that the number of messengers under six-[fol. 8] teen has not at any one time exceeded approximately 5 per cent of the total number of defendant's messengers, and the messengers under eighteen engaged in the operation of motor vehicles (other than telemotors or

scooters) has not exceeded approximately 11/100 of 1 per cent (.0011) of the total number of messengers, or, if telemotor or scooter messengers are included, not more than 31/100 of 1 per cent (.0031); and that such operators of motor vehicles were not employed regularly, but on a temporary basis during emergencies or in handling holiday loads.

Wherefore, defendant asks judgment that the plaintiff's complaint be dismissed.

Francis R. Stark, Clarence W. Roberts, Attorneys for Defendant, Office & P. O. Address, 60 Hudson Street, New York, New York.

(Verified.)

[fol. 9] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 19-78

[Same Title]

STIPULATION OF FACTS

To expedite the trial of the above-entitled action and to avoid the necessity of presenting detailed and voluminous oral testimony and documentary evidence, it is hereby stipulated and agreed by and between the attorneys for the plaintiff and the attorneys for the defendant, that:

1. The defendant is engaged in the transmission and delivery of telegraph messages throughout the United States and in foreign countries. The messages transmitted by the defendant are delivered to all parts of the world over telegraph land and cable lines operated by the defendant and over connecting land and cable lines and radio facilities operated by other companies which have agreements with the defendant to deliver such messages to areas not directly reached by the defendant's telegraph system.

2. In connection with its land line telegraph business the defendant operates telegraph offices located in large and small communities throughout the United States. These offices are linked together for telegraphic communication by approximately 209,000 miles of telegraph pole lines oper-

ated by the defendant, which traverse every state in the Union and the District of Columbia. The messages transmitted by the defendant are received and delivered by the following methods: messengers, over-the-counter, telephone, and private telegraph wire.

[fol. 10] 3. Approximately 15,000 telegraph messengers are employed by the defendant. These messengers work in some 3,100 public message telegraph offices, hereinafter termed public offices, operated by the defendant in every part of the United States. The duties of the messengers are to collect and deliver telegraph messages. Approximately 36 per cent of the telegraph messages transmitted by defendant are collected by defendant's messengers and about 64 per cent of such messages are delivered to their destination by such messengers.

4. The large majority of the telegraph messengers employed by the defendant use bicycles in the performance of their work. A smaller number, who work at offices serving compact and congested areas, collect and deliver telegraph messages on foot. In a lesser number of offices, messengers operate motor vehicles in performing their duties.

5. Defendant receives telegraph messages from the public at its public offices over-the-counter, by telephone, by telegraphic tie lines, and through defendant's messengers. Most messages received over-the-counter are inscribed on telegraph blanks in the public office, usually by their senders but in some cases by employees of the defendant who take down the message as dictated by the sender. Messages received by telephone are taken down and inscribed on telegraph blanks by operators employed by the defendant. Messages received by telegraphic tie lines are printed in the public office on a telegraph blank or on a gummed paper tape in the manner described in paragraph 7(a) below. Messages received at such offices by means of defendant's messengers are inscribed by their senders and picked up by the messengers at the establishments of their senders in response either to telephone requests or signals received at public offices from call boxes located in such establishments which are connected by wire with such offices. When a messenger collects a message and carries it to defendant's [fol. 11] office (or takes a message from defendant's office

and makes delivery), his activities with reference to the message end.

6. At the public office where the message originates, the message is stamped to show the date and time of filing. The number of words and class of telegraph service are also noted on the message. In some cases, where the clerk receiving the message at the public office is uncertain as to a word because of wrong spelling or illegibility, he will, in order to avoid error in the transmission of the message, inquire from the sender what the word is and print over the uncertain word the word intended to be meant. Where two words have wrongly been combined as one, or one word has erroneously been written as two words, the clerk will separate or combine the words. At the sender's request, he will also change words, or omit, or add words, in order to clarify the meaning of the message or to shorten it.

7. The message thus originating in a public office is then transmitted to a central operating room, usually in the same community or area, hereinafter called the message center. Except in a relatively few isolated cases where other methods are used, the transmission to the message center takes place either by teleprinter telegraph or by pneumatic tube. The method used in transmission in each case is as follows:

(a) *Teleprinter telegraph*—This is the method used in transmitting telegraph messages to message centers from the vast majority of public offices. Where this method is used, the public office is connected to the message center by a telegraphic circuit through which electric current flows and it is by means of this circuit that messages are transmitted between the two offices. A message originating at a public office is transmitted by the operation of a teleprinter machine which is con- [fol. 12] nected to the telegraphic circuit. A teleprinter operator employed at the public office manipulates a keyboard of the teleprinter, similar to the keyboard of an ordinary typewriter. Each depression of a key by the teleprinter operator causes interruptions and/or electric impulses in the electric current flowing through the telegraphic circuit. The number and spacing of such electric impulses represent letters of the alphabet and other significant symbols. These electric

impulses in turn cause a similar teleprinter in the message center to print the message at that office either on a telegraph blank or on a gummed paper tape which is then pasted on a telegraph blank.

(b) *Pneumatic tube*—In some cities this method is used in moving telegraph messages from public offices located in the same building or in the immediate vicinity of the message center. Where this method is used, an employee in the public office, after adding the telegraphic information referred to above, places the telegraph blank containing the message in a "carrier" capsule and inserts the "carrier" in the pneumatic tube, which carries it to the message center.

8. The message centers to which the messages have been forwarded from the public offices are connected with message centers in other communities by telegraphic circuits similar to the circuits connecting the message centers with its public offices. When the messages are received at the message center they are sent to a distributing center in that office where they are routed by writing on each message the name or symbol of the proper outgoing telegraphic circuit. They are then dispatched to the sending machine for such circuit. The written or printed messages are forwarded to different positions within the message center by means of [fol. 13] a conveyor belt, a pneumatic tube, an intra-office messenger, or a combination of these methods.

9. Telegraph messages are transmitted between message centers over connecting telegraph lines, usually by means of either teleprinters or multiplex printers, and, in a small number of instances, by means of Morse telegraphy. The method of transmission in each case is as follows:

(a) *Teleprinter transmission*—Teleprinter transmission between message centers is identical with teleprinter transmission between public offices and message centers described in paragraph 7(a) above.

(b) *Multiplex printer transmission* — Where this method is used a telegraphic circuit, similar to that used in teleprinter transmission, connects the message centers. Also, as in teleprinter transmission, the manipulation of the keyboard of a sending machine by

an operator at the message center from which the message is being dispatched causes a receiving machine in the other message center to reprint the message in the form of ordinary letters and symbols on a gummed paper tape. The transmission differs from teleprinter transmission, however, in that the operation of a multiplex printer, instead of creating electric impulses directly, first makes perforations in a tape in the sending office. This tape feeds directly into an automatic transmitter machine effecting changes in the electric current flowing through the telegraphic circuit and thus creating the electric impulses used in the transmission of the message. As in the case of teleprinter transmission the electric impulses activate the receiving machine into reprinting the message. Multiplex transmission enables eight messages to be sent over a single circuit at the same time.

[fol. 14] (c) *Morse telegraphy*—In Morse telegraphy the operation by hand of a key in the message center from which the message is sent causes electric impulses in the telegraphic circuit between the two message centers which in turn activates a sounding machine in the message center where the message is being received in the form of sounds representing the letters of the alphabet and other symbols. These sounds are translated and the message written down on a telegraph blank by an operator in the receiving office who is listening to the sounding machine.

10. Direct current electricity is used in telegraph transmission both between message centers and between message centers and public offices. In almost all instances this direct current is created at the message centers either by motor generators in such centers or by rectifying alternating current purchased from an electric power company.

11. After a message has been received at a message center from another message center it is routed through the distributing center in that office to the outgoing circuit connected with the proper public office, the operations involved in moving the message through the message center being similar to the operations performed with respect to messages received at the message center from a public office

for inter-city transmission. The message is then transmitted to the public office in the same fashion that messages originating at public offices are forwarded to the message center, usually by teleprinter transmission and, in the case of a small number of offices, by being dispatched physically through pneumatic tubes. Where the former method is used, the operation of the teleprinter in the message center causes a similar teleprinter in the public office to reprint the message.

[fol. 15] 12. Messages received at the public office by teleprinter telegraph are time-stamped at the public office and messages received via pneumatic tube have already been time-stamped at the connecting message center. In most instances no additional information is added at the public office. However, in the case of collect telegrams, notation of the tolls to be collected is placed on the telegraph blank in the public office. In most instances, the delivery of a telegraph message to the sendee from a public office is made by a messenger employed at such office.

13. A substantial proportion of the telegraph messages originating at all of the offices of the defendant is transmitted by defendant in inter-state commerce before delivery to their sendees. In most instances, the movement of the message across State lines occurs during its transmission between message centers. In addition, however, in the case of public offices in cities located near State lines, messages originating at such offices move across State lines during their transmission to connecting message centers in other States.

14. Within the period covered by the allegations of the complaint in this action, and continuing to the date hereof, defendant has employed in the public offices described above persons under 16 years of age as telegraph messengers, and persons between 16 and 18 years of age as telegraph messengers in the occupation of motor vehicle drivers, but only in those States where such employment is permitted by State law. The number of messengers under 16 years of age employed by defendant did not at any one time prior to September 2, 1942, the date of defendant's answer herein, exceed approximately 5 per cent of the total number of defendant's messengers, and the messengers between 16 and 18 years of age engaged in the operation of motor vehicles

(other than telemotors or scooters) during such period did [fol. 16] not exceed, approximately, .0011 per cent of the total number of messengers, or if telemotor or scooter messengers are included not more than .0031 per cent; and as of March 31, 1943, 11.14 per cent of the total number of messengers employed by defendant were under 16 years of age and .0033 per cent of the total number of messengers were between 16 and 18 years of age and employed as operators of motor vehicles, including telemotors and scooters.

Dated: New York, June 18, 1943.

Douglas B. Maggs, Solicitor. Irving J. Levy, Associate Solicitor. Julius Schlezinger, Principal Attorney. John K. Carroll, Regional Attorney. John A. Hughes, Attorney. United States Department of Labor, Attorneys for the Plaintiff.

(Sgd.) Francis R. Stark, Clarence W. Roberts, Attorneys for the defendant.

[fol. 17] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 19-78

[Same Title]

PLAINTIFF'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

To Francis R. Stark, Esquire, Attorney for Defendant, 60 Hudson Street, New York, New York:

Please take notice, that the undersigned will bring the attached motion for summary judgment on for hearing before this court at Room 506, United States Courts and Post Office Building, Borough of Manhattan, City of New York, on the third day of August, 1943, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Douglas B. Maggs, Solicitor. Irving J. Levy, Associate Solicitor. Julius Schlezinger, Principal Attorney. John K. Carroll, Regional Attorney. John A. Hughes, Attorney. United States Department of Labor, Attorneys for the Plaintiff.

[fol. 18] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 19-78

[Same Title]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff after filing of the defendant's answer and after the pleadings are closed, and moves the court for the entry of a summary judgment on the following grounds:

1. The pleadings and admissions on file, together with the affidavit filed on behalf of the plaintiff in support of this motion, disclose no genuine issue as to any material fact.

2. All of the material facts bearing upon the issues raised by the pleadings have been stipulated and agreed to by the attorneys for the plaintiff and the attorneys for the defendant in a stipulation of facts which has been filed in this action.

3. The pleadings and admissions on file, together with the supporting affidavit, disclose that the court may make a final disposition of this action without the necessity of a trial.

4. The pleadings and admissions on file, together with the supporting affidavit, show on their face that the plaintiff is entitled to the entry of an injunction as demanded in the complaint.

[fol. 19] In support of this motion plaintiff attaches as a part hereof the affidavit of Julius Schlezinger.

Douglas B. Maggs, Solicitor. Irving J. Levy, Associate Solicitor. Julius Schlezinger, Principal Attorney. John K. Carroll, Regional Attorney. John A. Hughes, Attorney. United States Department of Labor, Attorneys for the Plaintiff.

[fol. 20] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 19-78

[Same Title]

AFFIDAVIT OF PLAINTIFF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

DISTRICT OF COLUMBIA,
City of Washington, ss:

Julius Schlezinger, being first duly sworn, deposes and says:

That he is a Principal Attorney of the United States Department of Labor and is authorized to exercise and perform the duties of his office as the official representative of the Chief of the Children's Bureau, United States Department of Labor, in accordance with the laws of the United States of America and the regulations of the said Department.

That this affidavit is made in support of plaintiff's motion for summary judgment for the purpose of showing that there is in this action no genuine issue as to any material fact, and that the plaintiff is entitled to judgment as a matter of law.

That all of the material facts bearing upon the issues raised by the pleadings are contained in a stipulation of facts which has been filed in this action.

Affiant, therefore, avers that the sole issue presented in this action is one of law to be determined by the court, [fol. 21] and that there is no necessity for the trial of any issues of fact.

Julius Schlezinger.

Sworn to before me this 20th day of July, 1943. Elsie E. Schwarz, Notary Public for District of Columbia, Commission Expires 2-29-48. (Seal.)

In the District Court of the United States for the Southern District of New York

Civ. 19-78

[Same Title]

Defendant's Notice of Cross-Motion For Summary Judgment

Please take notice, that the undersigned will bring the attached motion for summary judgment on for hearing before this court at Room 506, United States Courts and Post Office Building, Borough of Manhattan, City of New York, on the third day of August, 1943, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Francis R. Stark, Vice President & General Solicitor.
Clarence W. Roberts, Assistant General Solicitor,
Attorneys for Defendant.

[fol. 22] In the District Court of the United States For the Southern District of New York

Civ. 19-78

[Same Title]

Defendant's Cross-Motion for Summary Judgment

Comes now the defendant after filing of the defendant's answer and after the pleadings are closed, and moves the court for the entry of a summary judgment on the following grounds:

1. The pleadings and admissions on file, together with the affidavit filed on behalf of the plaintiff in support of this motion, disclose no genuine issue as to any material fact.

2. All of the material facts bearing upon the issues raised by the pleadings have been stipulated and agreed to by the attorneys for the plaintiff and the attorneys for the defendant in a stipulation of facts which has been filed in this action.

3. The pleadings and admissions on file, together with the supporting affidavit filed on behalf of the plaintiff in support of its motion for summary judgment, disclose that the court may make a final disposition of this action without the necessity of a trial.

4. The pleadings and admissions on file, together with the supporting affidavit filed on behalf of the plaintiff, in support of its motion for summary judgment, show on their face that the plaintiff is not entitled to the entry of an injunction as demanded in the complaint, but that the defend-
[fol. 23] ant is entitled to a judgment dismissing the plaintiff's complaint together with costs and disbursements of the action.

In support of defendant's cross-motion for a summary judgment, refers to and makes a part of the defendant's cross-motion papers, the affidavit of Julius Schlezinger, sworn to on the 20th day of July 1943, attached to and made a part of the plaintiff's motion papers for summary judgment.

Dated: New York, N. Y., July 29, 1943.

Francis R. Stark, Clarence W. Roberts, Attorneys for Defendant, Office & P. O. Address, 60 Hudson Street, Borough of Manhattan, New York City.

To Douglas B. Maggs, Solicitor; Irving J. Levy, Associate Solicitor; Julius Schlezinger, Principal Attorney; John K. Carroll, Regional Attorney; John A. Hughes, Attorney, United States Department of Labor, Attorneys for the Plaintiff.

[fol. 24] In United States District Court, Southern District of New York

Civ. 19-78

[Same Title]

Appearances:

Douglas B. Maggs, Esq., Solicitor; Irving J. Levy, Esq., Associate Solicitor; Julius Schlezinger, Esq., Principal Attorney; John K. Carroll, Esq., Regional Attorney, John A.

Hughes, Esq., Attorney, all of United States Department of Labor, Attorneys for Plaintiff; Charles M. Joseph, Esq., of Counsel.

Francis R. Stark, Esq., Clarence W. Roberts, Esq., Attorneys for Defendant.

OPINION—Oct. 7, 1943

RIFKIND, J.:

All the facts have been stipulated and both parties move for summary judgment. Plaintiff is the Chief of the Children's Bureau of the United States Department of Labor, who is authorized, "subject to the direction and control of the Attorney General" to bring this action. Section 12(b) of the Fair Labor Standards Act of 1938.

Defendant is engaged in the transmission and delivery of telegraph messages throughout the United States and in foreign countries. Its principal office is within the Southern District of New York.

The action is to enjoin defendant from violating the provision of Section 15(a)(4) of the Fair Labor Standards [fol. 25] Act of 1938. The violations alleged are that, within the period beginning January 1, 1941, and continuing to the date of the complaint, defendant has been engaged in shipping telegraph messages in interstate commerce and in delivering telegraph messages for shipment in interstate commerce, such messages having been produced in its establishments in which oppressive child labor was employed.

The oppressive child labor was of two categories: (1) Within the period beginning January 1, 1941, and continuing to the date of the complaint, defendant employed in its establishments minors under 16 years of age; (2) within the period beginning January 1, 1942, and continuing to the date of the complaint, defendant employed in its establishments minors between 16 and 18 years of age in the occupation of motor vehicle driver.

The relevant statutory and regulatory provisions are set out in the margin.[1]

Only two questions are presented for decision. Are the activities of the defendant subject to the child labor provisions of the Act? If the answer is in the affirmative, should

[1] Footnote appears on pages 23 to 28 hereof.

injunctive relief be granted? It is the contention of defendant that it is not a "producer, manufacturer or dealer," that it does not "ship or deliver for shipment in commerce any goods." It is engaged, the defendant argues, in the transmission of ideas, whereas the statute governs only the shipment of tangible goods. Plaintiff argues that there is no such limiting language expressed in the statute and that no such limiting intention can be discovered in the policy and history of the statute.

A brief description of what actually occurs at the establishments of the defendant has been stipulated. Messages transmitted by defendant are received and delivered by the following methods: Messengers, over-the-counter, telephone and private telegraph wire. The large majority of messengers use bicycles. A smaller number perform their duties on foot. A still lesser number operate motor vehicles. [fol. 26] Over-the-counter messages are usually inscribed on a telegraph blank by the sender but, sometimes, by employees of defendant. Messages received by private telegraph wire are printed at an office of defendant on a telegraph blank or on gummed paper tape. Messages received by messenger are inscribed by the sender and carried by the messenger to an office of the defendant.

At the office where a message is received for transmission, an employee stamps it with the date and time of filing. He also notes the number of words and the class of telegraph service. If a word is illegible, or if words have been wrongly combined or broken, an employee of defendant makes the necessary correction. The stamped and corrected message is then transmitted to a message center either by means of a teleprinter operated on a telegraphic circuit or by pneumatic tube.

In the message center, each message is marked with the name or symbol of the message center to which it is to be routed. It is then distributed to the proper telegraph circuit for transmission to that message center. In most instances the message is conveyed to the designated message center from the originating message center by teleprinter, multiplex printer or Morse key. When the multiplex printer is used the message is first converted into a perforated paper which is fed into an automatic transmitter. In using either the teleprinter or the multiplex printer, the message is received in the form of symbols reprinted by a machine

at the receiving center. When the Morse key is used, the communicating signal is an audible one. An operator at the receiving center translates the audible code signals and reduces them to writing.

From the receiving message center, the messages are routed to the defendant's offices and delivered to the respective sendees by the same means by which the messages are originally received for transmission at message centers.

[fol. 27] On March 31, 1943, 11.14 per cent of defendants messengers were under 16 years of age, and 33/100 of one per cent were between 16 and 18 years of age and employed as operators of motor vehicles.

In analyzing the provisions of the Child Labor sections of the Fair Labor Standards Act, two general considerations must be observed. First, the incidence of these provisions of the statute is not aimed at those engaged in interstate commerce, nor at those who produce goods for commerce. (Cf. Sections 6 and 7 of the Act.) The statute does not prohibit the employment of child labor. The ban of the statute is against *shipment* or *delivery for shipment*, in commerce, by a producer, manufacturer or dealer of any goods produced in an establishment situated in the United States in or about which any oppressive child labor has been employed. Second, the statute establishes a national policy and a national standard of child labor. It does not constitute merely an additional sanction for the enforcement of varying state child labor laws.

Those two characteristics of the statute are the fruits of a long national debate and considerable legislative experimentation.[2]

The history of the statute is consistent only with the conclusion that Congress intended to keep the arteries of commerce free from pollution by the sweat of child labor. To accomplish this result with the least difficulty, the law prohibited the introduction into the stream of commerce, not only of the products of child labor *but of all of the products of an establishment where any child labor had been employed within 30 days.* In view of the breadth of the congressional policy, the opening hypothesis should be that the defendant is subject to the Act unless reason for lack of application is clearly shown. (I am not speaking of the burden of proof, since the case presents no issues of fact.)

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[2] Footnote appears on pages 28 to 29 hereof.

We look first to the list of exemptions enacted by Congress. Section 13(c) exempts one class of agricultural [fol. 28] employees. It further makes the law inapplicable "to any child employed as an actor in motion pictures or theatrical productions." I think I may take judicial notice of the fact that for a generation or more the employment of young messengers by the telegraph companies in the United States has been open and notorious. How simple it would have been, were such the intention of Congress, to add to Section 13(c) a few words describing them. Indeed, in another connection, messengers are expressly mentioned in Section 14. The answer to this query might be that such an express exemption would be inconsistent with the scheme of the Act which, it is asserted, deals only with tangibles; but observe the words "theatrical productions." Granted that motion picture producers manufacture tangible film, what tangible goods are produced at a theatrical production? Theatrical production can be tele-casted or televised. Manifestly Congress was unwilling to rely on the intangible character of such goods to take them out of the statutory prohibition and granted an express exemption to child actors. It gives no such explicit sanction to the employment of children as telegraph messengers.

Defendant's chief reliance is upon the "obvious and natural import of the language." U. S. *v.* Goldenberg, 1897, 168 U. S. 95, 102. Lynch v. Alworth-Stephens Co., 1925, 267 U. S. 364, 370. The words "producer" and "goods" especially when used in a context with "ship," it is contended, require a construction of the statute which limits its application to producers of goods that can be shipped, or tangible goods.

Reliance upon the common meaning of the terms employed is misplaced when Congress has enacted definitions which necessarily displace both the dictionary and common usage as authority for the meanings of the words employed. Thus, under the statute, "produced" includes "handled, or in any other manner worked on." Section 3(j). "Goods includes articles or *subjects of commerce of* [fol. 29] *any character*. Section 3(i). If only tangible goods were within the purview of the statute, what do the emphasized words add to the words "wares, products, commodities, merchandise," which precede them? Assuming that "articles of commerce" might be disregarded as no

more than a verbal flourish, usually deprived of effect by the rule of *noscitur a sociis* (Virginia *v.* Tennessee, 1893, 148 U. S. 503, 519; U. S. *v.* Baumgartner, S. D. Cal. 259 Fed. 722, 724), the insertion of "subjects of commerce" seems insistently to demand that tangibility shall not be the required attribute of the goods. The phrase "subjects of commerce" has a history which the manifest professional draftsmanship of the statute must be deemed to have recognized. In Gibbons *v.* Ogden, 1824, 9 Wheat. 1, 229, the court said:

> "Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labour, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become subjects of commercial regulation."

In Western Union Teleg. Co. *v.* Pendleton, 1887, 122 U. S. 347, the court indicated that the subject of the commerce of the telegraph companies was the "ideas, wishes, orders and intelligence" carried by them.

In Utah Power & Light Co. *v.* Pfost, 1932, 286 U. S. 165, 180, the court was discussing the generation and transmission of electrical energy. It reflected no hesitation in describing the process as one of "production as well as transmission of a definite supply of an article of trade." If the mysterious flow of intangible and invisible electrical energy can be described as an article of trade, I see no reason why it should lose that character when freighted with intelligence. That telegraph messages "constitute a portion of [fol. 30] commerce itself," has been said by the court in Western Union Teleg. Co. *v.* James, 1896, 162 U. S. 650, 654.

The fact that in the course of the legislative career of the statute, the phrase "articles of trade of any character" which appeared in S. 2475 (introduced in the Senate on May 24, 1937) became "articles or subjects of commerce of any character," in the bill as it passed the Senate and was accepted by the Conference Committee, can only reflect an intention to expand the coverage of the Act.

Once we reach the conclusion that the messages telegraphed by defendant are goods within the meaning of the statute, there is not much difficulty in finding that these goods are produced in the defendant's establishments.

Clearly they are "handled" and "worked on." In the light of the statutory definition, the argument that the defendant simply transmits the ideas of its customers and that it is not a producer, must fall as a matter of law. It falls also as a matter of fact, for it is the work of the defendant which transmutes the ideas of the customers into telegraphic messages by means of a series of changes and processes already described.

More troublesome is the question whether the defendant "shipped" goods in commerce. The word "ship" is not defined by the statute. Since the verb, shipped, is derived from the noun, ship, linguistic purists might limit its connotation to transportation by water. Common usage, however, has long sanctioned the use of the phrases, to ship by rail, or to ship by air, or to ship by truck. It is used synonymously with transport and convey. The defendant conveys its messages by wire. The Supreme Court has spoken of the telegraph companies as engaged in "transportation." It has called the defendant a "carrier of messages" and compared it to a railroad, as a "carrier of goods." Western Union Teleg. Co. *v.* Texas, 1881, 105 U. S. 460, 464, re- [fol. 31] ferring to Pensacola Teleg. Co. *v.* Western Union Teleg. Co., 96 U. S. 1.

I do not think that Congress intended to limit the application of the Act to the conventional modes of shipment. Its broad policy was to keep the streams of interstate commerce undefiled by the products of child labor. It is a remedial statute entitled to liberal interpretation. Missel *v.* Overnight Motor Transportation Co., C. C. A. 4, 1942, 126 Fed. (2d) 98, 103, affirmed, 316 U. S. 572. One cannot escape the prohibition of the statute by inventing a magic carpet.

Barthoiome *v.* Baltimore Fire Patrol and Despatch Co., D. Maryland, 1942, 48 Fed. Supp. 98, 102, supports the view, here rejected, that the statute deals only with tangible goods. The authority of the case has been dimmed by the rejection of its holding in Walling *v.* Sondock, C. C. A. 5, 1942, 132 Fed. (2d) 77, certiorari denied, 63 Sup. Ct. 769.

Since I have found that, within the meaning of the child labor provisions of the Act, the defendant is a producer engaged in shipping, in commerce, goods produced in establishments where oppressive child labor is employed, I must conclude that the defendant is violating the statute.

The final question is whether plaintiff is entitled to injunctive relief.

The remedy is authorized by Section 17. Against the granting of the remedy the defendant urges the argument of public policy. No one can question the imperative demand for telegraphic communication in furtherance of the war effort, both in military activity and in the production of the tools of warmaking. I accept also the proposition that public interest is a proper ingredient for consideration whenever the extraordinary remedy of injunction is sought. Here, however, we have two public interests to subserve, one suggested by defendant, the precise character of which, as well as its reach, courts can only discover in very vague [fol. 32] and general terms, and one declared by Congress, after a great national debate. Under such circumstances I hold to the view that the function of the courts is to accept the mandate of the Congress and not to blunt the thrust of its purpose with the barnacles of individual exceptions. Congress is well aware of the problems of the defendant. Only very recently it found time to authorize defendant's merger with Postal Telegraph Company. If the execution of the statutory command is an unreasonable burden upon the prosecution of the war, Congress, which has means of ascertaining all the facts, rather than the courts, should be called upon for relief. So far, however, Congress has refused to heed similar pleas from other sections of industry affected by the ameliorative measures enacted during the past decade.

Plaintiff is entitled to a decree; and upon the settlement thereof the Court will hear the parties concerning the ways and means of avoiding any interruption of defendant's business.

Decree for plaintiff.

Dated October 7, 1943.

(signed) Simon H. Rifkind, U. S. D. J.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

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[1] Sec. 3. As used in this Act—

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such em- [fol. 33] ployee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

Sec. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturers, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: Provided, That a prosecution and conviction of a defendant for the

shipment or delivery for shipment of any goods under the [fol. 34] conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

Sec. 13. (c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(4) to violate any of the provisions of section 12.

November 27, 1939.

CHILD LABOR REGULATIONS

Order No. 2

Occupations Particularly Hazardous for the Employment of Minors Between 16 and 18 Years of Age

Or Detrimental to Their Health or Well-Being

Sec. 422.2 *Motor-vehicle driver and helper.*—(a) *Finding of fact.*—By virtue of and pursuant to the authority conferred by section 3(1) of the Fair Labor Standards Act of 1938 and pursuant to the regulation prescribing the "Procedure Governing Determinations of Hazardous Occupations"; an investigation having been conducted with respect to the hazards for minors between 16 and 18 years [fol. 35] of age of employment in the occupations of motor-

vehicle driver and helper; a report of the investigation having been submitted to the Chief of the Children's Bureau showing that:

"1. Work on motor vehicles involves a high degree of accident risk for persons of all ages, a risk which is particularly high in the case of young persons, who are lacking in the experience and in the caution required for safety in motor-vehicle operation.

"2. Workmen's compensation experience generally shows for the occupational classifications representing motor-vehicle drivers and helpers a compensation cost higher than the average for manufacturing classifications.

"3. The opinion of experts in motor-vehicle safety and of others having practical experience in the field of motor-vehicle operation who were consulted in the course of the investigation is that employment as driver or as helper on motor vehicles is especially hazardous for young persons.

"4. Motor-vehicle drivers between 16 and 18 years of age have been found to be involved in a larger number of fatal accidents in proportion to miles driven than drivers in any older age group. In a study covering fatal accidents within a 5-year period in one State the fatal-accident rate was found to be nine times greater for 16-year-old drivers and six times greater for 17-year-old drivers than for those 45 to 50 years of age, the age group with the lowest fatal-accident rate.

"5. Under many industry codes adopted pursuant to the National Industrial Recovery Act the work of motor-vehicle drivers and helpers was listed as a hazardous occupation and as such was prohibited for minors under 18 years of age.

"6. Acting pursuant to the authority conferred upon it by the Motor Carrier Act of 1935, the Interstate Commerce Commission has established as necessary for safety a minimum age of 21 years for motor-[fol. 36] vehicle drivers, in regulations applicable to common carriers and contract carriers engaged in in-

terstate commerce. An examiner for the Commission has recommended, after investigation and public hearing, that the same minimum age for motor-vehicle drivers be applied, with certain exceptions not here material, to private carriers engaged in interstate commerce.

"7. State legislation, which reflects public recognition of the special hazards incident to the driving of motor vehicles by young persons, has established the following standards:

(a) In each of the States and the District of Columbia there is a legal minimum age for drivers of motor vehicles which is higher than that for general employment, the legal minimum age for drivers being applicable to (1) all persons operating motor vehicles, or (2) persons operating motor vehicles as employees, or (3) persons operating motor vehicles for common, contract, or private carriers.

(b) In 28 States and the District of Columbia there is a minimum age of at least 18 years applicable to (1) all persons operating motor vehicles or (2) persons operating motor vehicles as employees.

"8. A minimum age of 18 years or higher for the employment of motor-vehicle drivers and helpers has been adopted voluntarily as a general policy by many employers and by the branch of organized labor especially concerned with employment in this field";

a finding and order relating to the employment of minors between 16 and 18 years of age in the said occupations having been proposed for final adoption by the Chief of the Children's Bureau upon the basis of the said report of investigation; a public hearing having been held with respect to the said proposed finding and order; all statements submitted in connection with the said hearing having been fully considered; opportunity having been given to all interested parties to file objections within 15 days following [fol. 37] publication in the *Federal Register* of the proposed finding and order, and no objection disclosing just cause for revision thereof having been received; and sufficient reason appearing therefor,

Now, Therefore, I, Katharine F. Lenroot, Chief of the Children's Bureau of the United States Department of Labor, hereby find that the occupations of motor-vehicle driver and helper are particularly hazardous for the employment of minors between 16 and 18 years of age.

(b) *Order.*—Accordingly, I hereby declare that the occupations of motor-vehicle driver and helper are particularly hazardous for the employment of minors between 16 and 18 years of age.

Definitions. For the purpose of this order—

(1) The term "motor vehicle" shall mean any automobile, truck, truck-tractor, trailer, semi-trailer, motorcycle, or similar vehicle propelled or drawn by mechanical power and designed for use as a means of transportation but shall not include any vehicle operated exclusively on rails.

(2) The term "driver" shall mean any individual who, in the course of his employment, drives a motor vehicle at any time.

(3) The term "helper" shall mean any individual, other than a driver, whose work in connection with the transportation or delivery of goods includes riding on a motor vehicle.

This order shall not justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established herein. This order shall become effective on January 1, 1940, and shall be in force and effect until amended or repealed by order hereafter made and published by the Chief of the Children's Bureau.

Katharine F. Lenroot, Chief of the Children's Bureau.

[fol. 38] [2] The first state minimum age law was adopted in 1848, by the State of Pennsylvania. Session Laws 1848, P. L. 278. Twelve years was the minimum established, and it was made applicable to textile factories. As industrialization expanded, awareness of the child labor problem grew. By the turn of the century, 24 States had enacted minimum age standards for various classes of activity.

History of Labor in the United States, Commons and Associates, Vol. 3, p. 404, Macmillan Company, New York, 1935. Nevertheless in 1910, nearly two million children, between the ages of 10 and 16, 18 per cent of the total number of children in that age group, were gainfully employed. Child Labor: Facts and Figures, Publication 197, Revised, Children's Bureau, U. S. Department of Labor, 1933, pp. 2, 70-71.

Congressional attempts to deal with child labor nationally began with the introduction of bills in 1906. It was 10 years, however, before Congress enacted the first Federal Child Labor Law, 39 Stat. 675, C. 432, which extended only to factories, manufacturing establishments, canneries, workshops, mines and quarries. This law was declared unconstitutional. Hammer *v.* Dagenhart, 1918, 247 U. S. 251. Congress immediately thereafter made an attempt to regulate child labor by the use of the taxation power. 40 Stat. 1138, C. 18. This, too, was declared unconstitutional by the Supreme Court. Bailey *v.* Drexel Furniture Co., 1922, 259 U. S. 20. In 1924, Congress submitted to the States, for ratification, a proposed amendment to the Constitution, authorizing Congress "to limit, regulate and prohibit the labor of persons under 18 years of age." It has been ratified by 28 States.

Under the National Industrial Recovery Act, 576 Codes were adopted, each of them containing minimum age provisions. After Schechter Poultry Corp. *v.* U. S., 1935, 295 U. S. 495, which declared that Act unconstitutional, the number of children leaving school for work sharply increased. Trend of Child Labor 1927-1936, Monthly Labor Review, December 1937, page 1375, published by the United States Department of Labor.

The legislative history of the child labor provisions of the Fair Labor Standards Act began with a message from [fol. 39] the President to the Congress on May 24, 1937, Senate Report 884, 75th Congress, First Session. Senator Black and Congressman Connery, on the same day, introduced identical bills which were to become the Fair Labor Standards Act, S. 2475, H. R. 7200. The bills made unlawful the shipment into any State of goods to be sold or used contrary to the laws of that State. It thus followed the model of the Convict Made Goods Act, 49 Stat. 494, and of the pre-prohibition attempts to deal with the liquor traffic.

In other respects the child labor provisions were tied in with the provisions regulating wages and hours.

Organizations interested in child-labor legislation appeared before the committees of Congress and urged the vesting of child labor regulation in the Children's Bureau, coverage on an establishment rather than on an employee basis to facilitate enforcement, and the adoption of a uniform national age minimum. These proposals provoked wide divergence of opinion and division between the two Houses. These differences were not resolved until a conference committee reported the bill in the form in which it was enacted. See S. 2475, Section 23(e), 75th Congress, First Session, as reported to the Senate; 81 Congressional Record, pages 7949 to 7951; S. 2475, Section 10(a) and Section 10(b), 75th Congress, Third Session, as reported to the House, April 21, 1938; 82 Congressional Record, page 1780; Conference Report No. 2738, House of Representatives, 75th Congress, Third Session, to accompany S. 2475, June 11, 1938, page 32.

This Act was held constitutional, and Hammer *v.* Dagenhart, overruled, in U. S. *v.* Darby, 1941, 312 U. S. 100.

[fol. 40] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 19-78

[Same Title]

JUDGMENT

Motions having regularly been made by both parties, each for summary judgment in his favor and against the other, on the ground that there is no genuine issue as to any material fact,

And having read the complaint, answer, stipulation of facts, plaintiff's motion for summary judgment and affidavit in support thereof, and defendant's cross-motion for summary judgment in its favor and in opposition to said motion of plaintiff, and having heard Julius Schlezinger, Esquire, attorney for plaintiff and Clarence W. Roberts, Esquire, attorney for defendant, and due deliberation having been had, it is

Ordered, adjudged and decreed that plaintiff's motion for summary judgment be, and hereby is, granted, and that defendant's motion for summary judgment be, and, hereby is, denied.

Now, therefore, on motion of the attorneys for the plaintiff, it is hereby

Ordered, adjudged and decreed that defendant, its officers, agents, servants, employees, attorneys, and all persons acting or claiming to act in its behalf and interest be and they hereby are permanently enjoined and restrained from violating the provisions of Section 15(a)(4) of the [fol. 41] Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, U. S. C., Title 29, Sec. 201, et seq.), hereinafter referred to as the Act, in any of the following manners:

Transmitting in interstate commerce or delivering for transmission in interstate commerce or in any other manner shipping in interstate commerce or delivering for shipment in interstate commerce telegraph or other messages or any other goods produced by or for defendant or under its direction in any establishment or establishments in the United States in or about which within thirty (30) days prior to the transmission or other removal of such messages or other goods therefrom, there shall have been employed, suffered or permitted to work on or after the date hereof any oppressive child labor, as defined in the Act, to-wit:

(1) Any employee under the age of 16 years in any occupation; or

(2) Any employee between the ages of 16 and 18 years in any occupation which the Chief of the Children's Bureau of the United States Department of Labor, pursuant to Section 3(1) of the Act, has by order declared, or may hereafter by order declare, to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being:

Provided, that the employment of employees between the ages of 14 and 16 years shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau, by regulation or order, pursuant to Section 3(1) of the

Act, determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their [fol. 42] health and well-being, and, upon motion of the attorneys for Defendant, it is

Further ordered, adjudged and decreed, provided Defendant serves and files its Notice of Appeal, from this Judgment, and Transcript of record within thirty (30) days from the date hereof, that this Judgment shall be suspended for a period of ninety (90) days from the date of the entry hereof, or until a decision of the defendant's appeal is handed down by the United States Circuit Court of Appeals for the Second Circuit, if that event takes place before the expiration of the said ninety (90) days, and it is

Further ordered, adjudged and decreed that costs be assessed against the defendant.

Dated this 15th day of November, 1943.

(Signed) Simon H. Rifkind, United States District Judge.

In District Court of the United States, Southern District of New York

Civ. 19-78

[Same Title]

Notice of Appeal

Notice is hereby given that The Western Union Telegraph Company, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Second Circuit, from [fol. 43] the final judgment entered in this action on the 16th day of November, 1943; except from the portion thereof which suspends the judgment for a period of ninety days from the date thereof.

Dated, New York, November 17, 1943.

Francis R. Stark, Clarence W. Roberts, Attorneys for Defendant, Office & Post Office Address, 60 Hudson Street, Borough of Manhattan, New York. 13, N. Y.

To: Douglas B. Maggs, Solicitor; Irving J. Levy, Associate Solicitor; Julius Schlezinger, Principal Attorney; John K. Carroll, Regional Attorney; John A. Hughes, Attorney, United States Department of Labor, Attorneys for Plaintiff, Office & Post Office Address: John K. Carroll, Regional Attorney, United States Department of Labor, 341 Ninth Avenue, New York, 1, N. Y., and Office of the Solicitor, United States Department of Labor, Washington, D. C.

To: Clerk of the United States District Court, Southern District of New York.

[fol. 44] In United States District Court, Southern District of New York

Civ. 19-78

[Same Title]

Stipulation as to Record

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, that the foregoing is a true transcript of the record of the District Court of the United States for the Southern District of New York in the above entitled action, as agreed upon by the parties.

Dated: New York, N. Y., December 10th, 1943.

Douglas B. Maggs, Solicitor; Irving J. Levy, Associate Solicitor; Julius Schlezinger, Principal Attorney; John K. Carroll, Regional Attorney; John A. Hughes, Attorney, United States Department of Labor, Attorneys for Plaintiff. Francis R. Stark, Clarence W. Roberts, Attorneys for Defendant.

[fol. 45] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 46] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1943

No. 247

(Argued February 4, 1944. Decided March 3, 1944)

KATHARINE F. LENROOT, Appellee,

v.

WESTERN UNION TELEGRAPH COMPANY, Appellant

Before Learned Hand, Augustus N. Hand and Frank, Circuit Judges

Appeal from a summary judgment of the District Court for the Southern District of New York, enjoining the defendant from violating the provisions of § 212(a) of Title 29, U. S. Code, by using messengers under the age of sixteen years, and motorcar drivers between the ages of sixteen and eighteen, in the transmission of telegrams.

Francis R. Stark, for the appellant.

Archibald Cox, for the appellee.

L. HAND, *Circuit Judge:*

The defendant appeals from an injunction, forbidding it to violate § 212(a) of Title 29, U. S. Code, by using messengers under sixteen, or motorcar drivers between sixteen [fol. 47] and eighteen in transmitting telegrams. Both parties agree that the employment in question is within the meaning of "oppressive child labor" in § 203(1) of Title 29, U. S. Code, and as defined by § 422.2 of Chapter 4, Title 29 of the Code of Federal Regulations; but the defendant maintains that the act does not apply to its business. The case was tried upon stipulated facts, most of which it is not necessary to state, as the general nature of the defendant's business is so well understood. All that we need say is that over eleven percent of the telegraph messengers employed by the defendant are under sixteen years of age, and that a small percentage of its motorcar drivers are between sixteen and eighteen. Both sides moved for summary judgment, since the outcome depended altogether upon the meaning of the statute; and

the judge, believing defendant to be within it, granted judgment for the plaintiff. We do not understand that the defendant disputes that it is engaged in interstate commerce; at any rate there can be no doubt that it is. *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347; *Western Union Telegraph Co.* v. *James*, 162 U. S. 650. Thus, Congress could unquestionably have forbidden the employment of the messengers and drivers here in question, if it had wished. That does not, however, answer the question whether § 212(a) covers the business; and it does not do so, unless the defendant is a "producer" of "goods" which it "ships" in interstate commerce. While it is of course true that, taken in their colloquial sense, these words do not apply to its activities, they should not be so taken, for the statute has made its own definitions in § 203. Subdivision i of that section reads as follows: " 'Goods' means goods • • • wares, products, commodities, merchandise or articles or subjects of commerce of any character." (Originally the words, "or subjects," were absent; they were added in the Senate Committee on Education and Labor.) [fol. 48] subdivision j reads: " 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on."

In order to learn whether the defendant's business falls within the section so defined, we must consider exactly what steps sending a telegram comprises. Ordinarily, it is true, the sender thinks of the telegram as the actual transmission of his words to the addressee; and so he speaks of "sending" it and of its being "delivered," as though the same thing had left him, passed to the addressee's home or office and was there handed to him. Indeed, the defendant itself uses that very argument in order to bring itself within the exception in § 215(a)(1) which exempts common carriers from the act as to any goods not produced by them. It does no more, it says, than transport to the addressee intangible objects—the sender's words transformed into electric impulses; it "produces" no "goods," even though we read those words with their definitions. We might indeed agree, if the defendant did no more than carry written messages between the parties; conceivably the same might even be true, if it only provided means—like a telephone—by which the parties could communicate, though these con-

sisted of pulsations of an electric current. But neither of these is what the defendant does. The sender either writes out his message on paper and delivers it to one of the defendant's messengers, or delievers it himself at one of the defendant's offices; or he dictates or telephones it to an employee at an office, who takes it down on paper in shorthand, or types it. The message so received never leaves that office; the addressee never sees it. Another employee—or perhaps the same one—either uses it as a text for pressing a key in suitable dots and dashes, having a conventional significance to him and to another employee at the opposite end of a wire; or as a text for manipulating some other suitable device—like a "teletype"—by which equivalent movements will appear upon a similar device at the end of [fol. 49] a wire. In either case nothing can be said to be "sent" between the office except pulsations of electrical current, which are not only not the sender's message, but would be totally incomprehensible to him or to the addressee, if either could perceive them. When these have been transmitted, they are either translated, if they are in code, or transcribed, if they are not; and the message so resulting is delivered either by messenger or by telephone to the addressee. From the foregoing it is at once apparent that there is not the least similarity between what the defendant does and the transportation of goods by a common carrier. It is also apparent that the defendant's activities are within the definition of "produced" in subdivision j of § 203; for, not only does it "handle" the sender's message, but it "works on" it, first, by changing it into something wholly different, and then by changing it back to a form like the original.

The only remaining question is whether the defendant "ships" any "goods." First, are there any "goods" concerned? To prove that there are the plaintiff relies upon the phrase, "subjects of commerce of any character" in subdivision i; to which the defendant answers that we must judge that phrase by its context, which necessarily limits its meaning to "tangible" objects. It is here that the Senate amendment becomes important. Until that was made the subdivision had read: "wares, products, commodities, merchandise or articles of commerce of any character." So far as we can see, no more complete enumeration could have been made of every kind of "tangible";

so that, when the Senate expanded the phrase to include, not only "articles" of commerce, but "subjects" of commerce, the opposition would have meant nothing, if it had not included "intangibles." Moreover, not only had all kinds of "tangibles" been already included, but "subjects of commerce" was not a good description of "tangibles." Its introduction into a phrase which had been sufficient to [fol. 50] include all kinds of "tangibles," cannot be set down to tautology, or slovenly draughting; it demands that some additional significance be added. We need not with the plaintiff resort to opinions such as those of Johnson, *J.*, in *Gibbons* v. *Ogden*, 9 Wheat. 229-30, in which the transmission of "intelligence" is spoken of as a "subject" of commerce. It is enough that we have unmistakable evidence of a purpose to extend the definition of subdivision i to everything which had been considered a "subject of commerce": that is, to whatever Congress could regulate as such a subject. Last, we have to say whether, assuming that a message received for transmission is "goods," and that the defendant "produces" it, it also "ships" the message, when it sends the pulsations over the telegraph wires. Although that is indeed an inappropriate word to apply to "intangibles," its unfitness for the most part disappears, once we treat messages as "goods." Certainly we should stultify ourselves, having gone so far, if we were to refuse to understand it as covering what is here involved.

So much for textual analysis. The defendant also argues that, aside from any verbal correspondence which can be spelled out between the section and its business, § 212(a) as a whole, and particularly the contrast between it and §§ 206 and 207, show that Congress did not mean to forbid the use of child labor when an employer was merely engaged in interstate commerce, but only in case he was engaged in shipping goods in commerce; in other words, that § 212(a) covers only those who are not engaged in interstate commerce. No reason is suggested for such a capricious limitation upon a purpose which was apparently pervasive; and the curious result would be that Congress singled out the more vulnerable of its powers for exercise, for in 1938, *Hammer* v. *Dagenhart*, 247 U. S. 251, had not yet been overruled. If it is right we must suppose that Congress meant to control the passage across state lines of goods

[fol. 51] made in a state under conditions which it disapproved—a power which at that time was still in doubt—but did not mean to regulate the conduct of interstate commerce in goods—a power which it had always incontestibly had. Moreover, there is no basis for the argument in the statute itself, for the contrast between the language of § 212(a) and of §§ 206 and 207, does not justify the inference made from it. The act was a compromise of two quite separate designs: that of the House, which was to regulate child labor by national standards; that of the Senate, which was to prevent one state from breaking down the standards of another by unregulated competition. The House won, and it would leave its plan in large part unrealized to omit child labor in interstate commerce—to say nothing of the fact that such commerce, and the shipment in commerce of goods made by child labor, are not inevitably mutually exclusive. *Fleming* v. *A. B. Kirschbaum Co.*, 124 Fed. (2) 567, 571, 572 n. 5 (C. C. A. 3), affirmed 316 U. S. 517.

The difference in language can be otherwise accounted for. The original scheme of the House was to give to the Secretary of Labor power to declare what industries "affected" interstate commerce. That was to be a condition upon both the child labor provisions, and wages and hours regulation. It had nothing to do with interstate commerce which was to be regulated anyway, without any action by the Secretary. The House plan was amended, however, changing the definition in §§ 206 and 207 to the phrase, "production of goods for commerce," which the courts were to construe without any aid from the Secretary. Section 212—then § 10—as originally proposed, contained two subdivisions: subdivision a being the same as it now is, and subdivision b containing the phrase, "engaged in commerce in any industry affecting commerce." That was the form also of §§ 206 and 207 during the period while the Secretary was to declare what industries did "affect [fol. 52] commerce." Subdivision b was deleted, because, as the Conference Report declared, the power given to the Secretary in section 6 of the House amendment had been taken away in Conference. That was perhaps a good reason for not retaining the phrase, "in any industry affecting commerce"; but it must be admitted that it is not clear why subdivison a was not amended to conform to §§ 206

and 207. Nevertheless, that gives us no ground for inferring that subdivision a was supposed to be more limited than §§ 206 and 207 in their amended form; verbally, as we have seen, it covers the situation at bar; and the reason given for deleting subdivision b suffices to show that Congress had no such purpose as the defendant imputes to it.

The defendant's arguments based upon the well-known canons of statutory interpretations we have not disregarded; but it is not necessary to say more than that, whatever their weight, they do not in our judgment overbear the construction we have adopted.

Judgment affirmed.

[fol. 53] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of March, one thousand nine hundred and forty-four.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Jerome N. Frank, Circuit Judges.

KATHARINE F. LENROOT, Plaintiff-Appellee,

v.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 54] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Katharine F. Lenroot, v. Western Union Telegraph Company. Order for Mandate. United States Circuit Court of Appeals: Second Circuit. Filed Mar. 20, 1944. Alexander M. Bell, Clerk.

[fol. 55] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 56] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 8, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 48,340. U. S. Circuit Court of Appeals, Second Circuit. Term No. 49. The Western Union Telegraph Company, Petitioner, vs. Katharine F. Lenroot, Chief of the Children's Bureau, United States Department of Labor. Petition for a writ of certiorari and exhibit thereto. Filed April 5, 1944. Term No. 49, O. T. 1944.